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10 Attorneys for Plaintiffs
11 LENSRAFTERS, INC., EYEXAM OF
12 CALIFORNIA, INC., and EYEMED VISION CARE, LLC

13 IN THE UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA

15 LENSRAFTERS, INC.; EYEXAM OF
16 CALIFORNIA, INC.; and EYEMED VISION
17 CARE, LLC,

18 Plaintiffs,

19 v.

20 LIBERTY MUTUAL FIRE INSURANCE
21 COMPANY and EXECUTIVE RISK SPECIALTY
22 INSURANCE COMPANY,

23 Defendants,

24 AND RELATED COUNTER- AND CROSS-
25 CLAIMS.

Case No.: CV-04-01001 SBA

**PLAINTIFFS' NOTICE OF
ADMINISTRATIVE MOTION AND
ADMINISTRATIVE MOTION TO
CONSIDER WHETHER CASES
SHOULD BE RELATED**

[LOCAL RULE 3-12(b)]

1 TO ALL PARTIES IN THIS ACTION AND IN CASE NO. C-07-2853 EMC AND THEIR
2 ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE THAT Plaintiffs LensCrafters, Inc., EYEXAM of California, Inc.
4 and EYEMED Vision Care, LLC hereby move pursuant to Local Rule 3-12(b) to request the
5 Court's consideration that Case No. C-07-2853 EMC, filed by LensCrafters, Inc. and EYEXAM of
6 California, Inc. on May 31, 2007, be deemed a "related case," within the meaning of Local Rule 3-
7 12(a), to the above action and that the case be re-assigned to the Honorable Sandra Brown
8 Armstrong. The basis for this motion is that both actions concern substantially the same parties and
9 issues, and it appears likely that there will be an unduly burdensome duplication of labor and
10 expense, and conflicting results, if the cases are conducted before different judges. This motion is
11 based on the accompanying Memorandum, the Declaration of Celia M. Jackson filed herewith, and
12 exhibits thereto, and the pleadings filed in both actions.

13 MEMORANDUM IN SUPPORT OF MOTION

14 I. INTRODUCTION

15 Plaintiffs hereby ask the Court to find that a case filed by LensCrafters, Inc. and EYEXAM
16 of California, Inc. on May 31, 2007, Case No. C 07 2852 EMC, is related to the above action and
17 that it be assigned to the Honorable Sandra Brown Armstrong. Both cases involve substantially
18 the same parties and issues, namely insurance coverage for a putative class action entitled *Melvin*
19 *Gene Snow, et al. v. LensCrafters, Inc., et al.*, San Francisco Superior Court Case No. CGC-02-
20 40554 (the "*Snow* Action"). The first action involved the duty to defend the *Snow* Action; the later-
21 filed action concerns the duty to indemnify the *Snow* Action. Claims related to the duty to
22 indemnify were initially pled in the first action, but were dismissed as not being ripe. Now these
23 claims are ripe. Given the time that the Court has already devoted to substantive motions in the
24 first action, it will serve the interests of judicial economy, and avoid the risk of conflicting results,
25 to have the later-filed case heard by Judge Armstrong. Four of the five defendants in the newly
26 filed action, including both defendants in the original action, do not object to having the Court
27 deem the second action related to the originally filed lawsuit.

1 **II. THE FIRST ACTION**

2 In March 2004, plaintiffs LensCrafters, Inc., EYEXAM of California, Inc. and EyeMed
3 Vision Care LLC filed the above action for declaratory relief and breach of contract against
4 defendant Liberty Mutual Fire Insurance Company ("Liberty") (the "First LensCrafters Action").
5 Plaintiffs later amended the complaint to add an additional defendant, Executive Risk Specialty
6 Insurance Company ("ERSIC"). *See* Declaration of Celia M. Jackson in Support of Administrative
7 Motion ("Jackson Dec."), filed herewith, at Ex. 1. The complaint alleged that Liberty and ERSIC
8 had an obligation to defend and indemnify plaintiffs with respect to the *Snow* Action and sought
9 declaratory relief on both issues. *Id.*

10 Upon cross-motions for summary judgment, the Court issued an Order determining that
11 Liberty and ERSIC had a duty to defend plaintiffs against the *Snow* Action. *See* Jackson Dec., Ex.
12 2. In a later summary judgment ruling involving Liberty and ERSIC, the Court ruled that the
13 ERSIC policy is excess to the Liberty policy. *Id.* at Ex. 3. Judgments related to both sets of
14 motions were entered on November 22, 2005 and November 7, 2005, respectively. Liberty has
15 appealed the judgments to the Ninth Circuit; that appeal is currently pending. *Id.*, ¶ 5.

16 By stipulation of the parties, plaintiffs' claims for indemnity alleged in the First
17 LensCrafters Action were dismissed without prejudice as not ripe for adjudication. Jackson Dec.,
18 Ex. 4. The June 21, 2005 Stipulation and Order dismissing the indemnity claims on that ground
19 provided that: (1) any party to the stipulation could file a new action to adjudicate the dismissed
20 indemnity claims, (2) such action must be filed in the Federal District Court for the Northern
21 District of California, and (3) the parties to the stipulation consent to exclusive jurisdiction and
22 venue of such an action in this Court. *Id.*

23 **III. THE SECOND ACTION**

24 On May 31, 2007, LensCrafters, Inc. and EYEXAM of California, Inc. filed a Complaint for
25 Declaratory Relief against Liberty, ERSIC and some additional insurers, which was assigned Case
26 No. C-07-2853 EMC (the "Second LensCrafters Action"). This action is the new action that was
27 provided for in the Court's Order dismissing the indemnity claims; it is being filed now because
28 settlement negotiations in the underlying *Snow* litigation have progressed to the point that the issue

1 of which insurers must indemnify plaintiffs for a judgment or settlement of the *Snow* Action is now
2 ripe for consideration. Jackson Dec., ¶ 7. The additional insurers named as defendants — Untied
3 States Fire Insurance Company, Markel American Insurance Company and Westchester Fire
4 Insurance Company — are plaintiffs' excess insurers. *Id.*

5 **IV. THE ACTIONS ARE RELATED**

6 The First LensCrafters Action and the Second LensCrafters Action are related cases within
7 the meaning of Local Rule 3-12. As explained above, the Second LensCrafters Action is the new
8 action that was provided for in the Court's Order dismissing the indemnity claims from the first
9 action. In addition, both plaintiffs in the Second LensCrafters Action were also plaintiffs in the
10 First LensCrafters Action. Likewise, there is an overlap of defendants in the two cases, as both of
11 the insurance company defendants from the First LensCrafters Action are defendants in the latter
12 action (three additional insurance companies have been added to fully resolve the issues in one
13 proceeding). The two actions involve the same underlying putative class action suit against
14 plaintiffs, the same transactions and events that gave rise to the underlying suit, the same insurance
15 policies (there are some additional policies at issue in the instant action), and substantially the same
16 insurance policy interpretation and coverage issues, including issues that already are the subject of a
17 summary judgment orders in the First LensCrafters Action. Four of the five defendants in the
18 Second LensCrafters Action (including the two defendants in the First LensCrafters Action) have
19 no objection to deeming the actions related and having the latter-filed action heard by Judge
20 Armstrong. *See* Jackson Dec., ¶¶ 8, 9.

21 Moreover, coordination before the Judge that is already familiar with, and has issued
22 summary judgment orders relating to, the complex insurance coverage issues involved in both cases
23 would conserve resources of the Court, avoid duplication of effort, avoid conflicts that could arise
24 from having two different judges addressing the same or substantially the same factual and legal
25 issues, and promote the most efficient determination of the latter-filed action.

26 **V. CONCLUSION**

27 For the reasons stated above, the Court should find that the two actions are related and
28 assign the later-filed action (No. C-07 2853 EMC) to the Honorable Sandra Brown Armstrong.

1 DATED: June 8, 2007

Respectfully submitted,

2 HELLER EHRMAN LLP

3
4 By /s/ Celia M. Jackson
5 Celia M. Jackson

6 Attorneys for Plaintiffs
7 LENSRAFTERS, INC., EYEXAM OF CALIFORNIA,
8 INC., AND EYEMED VISION CARE, LLC
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